United States Department of Labor
Employees' Compensation Appeals Board

E.S., widow of P.S., Appellant	)	
and	)	**Docket No. 20-0215**
	)	**Issued: August 24, 2021**
DEPARTMENT OF THE NAVY, NORTH ISLAND NAVAL BASE, Coronado, CO, Employer	)	

Appearances:
Daniel M. Goodkin, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On November 5, 2019 appellant, through counsel, filed a timely appeal from an August 29, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated May 20, 2016, to the filing of this

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

appeal, pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.[3]

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On June 13, 2012 appellant, filed a claim for compensation by widow (Form CA-5), alleging that her husband, the employee, an aerospace engineer, died on June 19, 2009 of aortic dissection and hypertension that was caused or aggravated by factors of his federal employment.

In a July 5, 2012 development letter, OWCP advised appellant of the deficiencies of her claim. It requested additional factual and medical evidence from appellant and the employing establishment. OWCP afforded both parties 30 days to respond.

On August 13, 2012 then-counsel contended that the employee's death was due to employment-related stress. He noted that the employee experienced various conflicts and stressful encounters with his supervisors and detailed multiple incidents supporting his allegations. In September 2005, the employee's supervisor, J.R., cautioned him regarding the slow progress of his work. When the employee responded that this was due to the distance of his office from his peers, and the lack of a computer workstation, J.R. became upset and used profanity. On September 5, 2005 the employee collapsed as he was leaving for work. He was diagnosed with atrial fibrillation which he attributed to extreme stress. On April 15, 2009 the employing establishment requested a release of medical information and his ability to work, but denied the employee's request for work accommodations. In May 2009, D.A. instructed the employee to work on procedures for the PATRAN computer system. The employee explained that he could not learn the system without input and instructions from coworkers, a learning course, and a detailed instruction manual. However, he was not provided with learning materials and developed stress while using the PATRAN computer system without the necessary training and guidance. The employee was also threatened with a performance improvement plan (PIP). Then-counsel contended that these work events and others, resulted in the employee developing anxiety which aggravated or resulting in his heart condition, leading to his death on June 19, 2009.

In a November 25, 2012 report, Dr. John A. Elefteriades, a Board-certified thoracic cardiovascular surgeon, reviewed the employee's medical records and noted that he had collapsed when boarding a transport van at the employing establishment on June 17, 2012. He noted that the employee was under extreme stress at work and that his job was in jeopardy. Dr. Elefteriades

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

cited studies had indicated that extreme exertion or emotion often preceded onset of acute aortic dissection with transient severe hypertension being the mode of instigation of the dissection process. He found that the employee exhibited a hereditary ascending aortic aneurysm which made him susceptible to aortic dissection, but that the acutely stressful events precipitated the dissection on June 17, 2012. Dr. Elefteriades also submitted articles from medical publications addressing the possible inciting events for actual aortic dissection.

In a January 22, 2014 development letter, OWCP requested that the employing establishment respond to appellant's allegations. It afforded the employing establishment 30 days to respond. The employing establishment responded on March 11, 2014 and noted that there were no records of conflicts or stressful encounters between the employee and his supervisors. The employee's most recent supervisor E.V., became his supervisor in 2007. E.V. noted that the employee previously had significant job performance issues. He asserted that the employee received computer training on PATRAN through formal courses and "hands on" training. E.V. reported that he sat down with younger engineers and the employee for "training sessions" on actual engineering tasks including MSC PATRAN. However, he further noted that the employee had a difficult time learning the PATRAN computer system. E.V. asserted that the employee was never put under pressure as his overdue work was given to other team members to complete, that the employee was never verbally "assaulted" and was never given conflicting instructions. In February or March 2009, he developed a PIP for the employee as his work was still not at an acceptable level. E.V. contended that this was not considered an adverse action and that it required a medical and health review to determine what, if any, medical restrictions might apply. He alleged that he had explained to the employee that the PIP was not an effort to terminate him, but to either improve his performance or to determine if there was another position in to which he could be reassigned. After reviewing the response of the employee's physician on May 15, 2009, E.V. held a meeting to discuss reasonable accommodation with the employee on June 9, 2009. He denied that the employee was required to satisfy quotas, work overtime, or travel. E.V. did not assign the employee intense or urgent tasks and he denied that there were staffing issues. He further asserted that the employee received the same training as other analysts. E.V. noted that the employee's performance was low, as he was unable to complete analysis work packages, his work required reassignment on a regular basis, and he was often tired and forgetful.

By decision dated May 20, 2016, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that the employee died due to factors of his federal employment. It found that appellant had not substantiated a compensable factor of employment as causing or contributing to the employee's death on June 19, 2009.[4]

On May 18, 2017 appellant requested reconsideration of the May 20, 2016 decision. She provided a statement detailing 34 alleged employment factors and points of disagreement with E.V.'s statement. Appellant alleged that E.V. demonstrated a disparate approach to older workers, which adversely impacted the employee. She alleged that the employee received inadequate computer training in PATRAN. Appellant asserted that the employee was concerned about his job security. She contended that E.V. was harassing the employee, created a hostile work environment, and had failed to inform him that there was another job available for him if he did

[4] On April 10, 2017 appellant informed OWCP that her prior counsel was no longer representing her.

not successfully complete the PIP. Appellant noted that the employee worked late on June 16, 2009 to prepare for a June 17, 2009 meeting that he believed would "make or break his job." The employee collapsed on June 17, 2009 while on the employing establishment property. Appellant alleged that E.V. informed her that the employee had displayed extreme stress and distress to him and had asked if he was going to be fired.

Appellant provided a statement from the employee dated September 2005 in which he discussed a meeting with J.R. regarding the slow progress of his work and asserted that J.R. used profanity to express his anger. The employee noted that two days later he fainted on the way to work and was diagnosed with atrial fibrillation. He asserted that he was under extreme stress due to the meeting and that he believed that this caused his atrial fibrillation. Appellant also provided a January 17, 2016 medical note from Dr. Edwin Iliff, a physician specializing in emergency medicine, reporting that on September 29, 2005 the employee experienced a syncopal episode and new onset atrial fibrillation.

On April 15, 2009 the employing establishment requested medical documentation from the employee and noted that the purpose was to have his physician determine if he had a medical condition that affected his ability to acceptably perform the essential functions of his position on a full-time basis. It noted the employee's delayed completion of work projects and his inability to learn and utilize preferred analysis methods and tools.

On May 18, 2009 the employee described his difficulties with the PATRAN computer system, and asserted that he could not learn the system on his own, but required either endless instruction from a patient coworker, a comprehensive and detailed instruction manual, or a concentrated hands-on course.

In a May 18, 2017 statement, S.L., a former coworker and employing establishment commuter van coordinator, noted that the employee collapsed at 2:10 p.m. shortly after he boarded the van and while still on the employing establishment premises. Appellant provided a map of the employing establishment premises.

Appellant alleged that the PIP process was misused against the employee. She submitted e-mails dated June 10, 2009 documenting that PIPs were no longer preferred at the employing establishment. Appellant further asserted that contacts with J.S. contributed to the employee's condition.

Appellant also provided an email exchange between herself and the maker of the PATRAN computer system which indicated that the platform required baseline training beyond a few sessions with a coworker.

By decision dated August 10, 2017, OWCP denied appellant's modification of her claim.[5] It found that appellant's statement was repetitious and that restating the arguments did not

[5] While OWCP noted it was denying the request for reconsideration under 5 U.S.C. § 8128(a), the August 10, 2017 decision reviewed the merits of appellant's claim.

constitute material new evidence and that none of the evidence submitted substantiated that the employing establishment acted improperly.[6]

On May 31, 2019 appellant, through counsel, again requested reconsideration. Counsel alleged an additional employment factor, namely that the employee had difficulty learning and operating the PATRAN computer system which his position required him to use. He alleged that this was a regularly-assigned job duty.

By decision dated August 29, 2019, OWCP denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.[7] OWCP's regulations establish a one-year time limitation for requesting reconsideration, which begins on the date of the original OWCP merit decision.[8] A right to reconsideration within one-year also accompanies any subsequent merit decision on the issues.[9] Timeliness is determined by the document receipt date, the received date in OWCP's Integrated Federal Employees' Compensation System (iFECS).[10] Imposition of this one-year filing limitation does not constitute an abuse of discretion.[11]

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP's final merit decision was in error.[12] Its procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's request for reconsideration demonstrates clear evidence of error on the part of OWCP.[13] In this

[6] This case record reflects that the decision was mailed to appellant at her address of record.

[7] 5 U.S.C. § 8128(a); *L.H.*, Docket No. 19-1174 (issued December 23, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

[8] 20 C.F.R. § 10.607(a).

[9] *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert F. Stone*, 57 ECAB 292 (2005).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

[11] *S.T.*, Docket No. 18-0925 (issued June 11, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[12] *C.V.*, Docket No. 18-0751 (issued February 22, 2019); *B.W.*, Docket No. 10-0323 (issued September 2, 2010); *M.E.*, 58 ECAB 309 (2007); *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

[13] *D.G.*, Docket No. 18-1038 (issued January 23, 2019); *Gladys Mercado*, 52 ECAB 255 (2001).

regard, OWCP will limit its focus to a review of how the newly-submitted evidence bears on the prior evidence of record.[14]

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.[15] The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.[16] Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.[17] It is not enough merely to demonstrate that the evidence could be construed so as to produce a contrary conclusion.[18] This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.[19] To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.[20] The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.[21]

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

[14] *V.G.*, Docket No. 19-0038 (issued June 18, 2019); *E.P.*, Docket No. 18-0423 (issued September 11, 2018); *Nelson T. Thompson*, 43 ECAB 919 (1992).

[15] *S.T., supra* note 11; *C.V., supra* note 12; *Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

[16] *S.T., supra* note 11; *E.P., supra* note 14; *Pasquale C. D'Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

[17] *L.B.*, Docket No. 19-0635 (issued August 23, 2019); *C.V., supra* note 12; *Leon J. Modrowski, supra* note 12; *Jesus D. Sanchez, supra* note 12.

[18] *Supra* note 14.

[19] *Supra* note 17.

[20] *D.G., supra* note 13; *Leon D. Faidley, Jr., supra* note 11.

[21] *C.V., supra* note 12; *George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

OWCP's regulations[22] and procedures[23] establish a one-year time limit for requesting reconsideration, which begins on the date of the last merit decision issued in the case. A right to reconsideration within one year also accompanies any subsequent merit decision on the issue(s).[24] The most recent merit decision addressing appellant's survivor benefits claim was OWCP's August 10, 2017 decision.[25] As her request for reconsideration was not received by OWCP until May 31, 2019, more than one year after the May 20, 2016 decision, the Board finds that it was untimely filed. Consequently, she must demonstrate clear evidence of error.

The Board further finds that appellant's reconsideration request fails to demonstrate clear evidence of error. Appellant has not submitted the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error in its decision.[26] Further, the evidence and argument she submitted does not raise a substantial question concerning the correctness of OWCP's decision.[27]

OWCP previously denied appellant's claim for survivor benefits as it found that she had not substantiated a compensable factor of employment as causing or contributing to an emotional condition which she alleged in turn caused or contributed to the employee's death on June 19, 2009. On reconsideration, appellant, through counsel, alleged an additional employment factor, name that the employee had difficulty learning and operating the PATRAN computer system which his position required him to use. Counsel contended that this was a regularly assigned job duty.

The Board, however, has reviewed these allegations and finds that they do not, on their face or otherwise, demonstrate clear evidence of error in OWCP's May 20, 2016 decision. Appellant has not explained how this argument raised a substantial question as to the correctness of OWCP's May 20, 2016 decision. The mere allegation of additional factors of employment does not establish error on the part of OWCP and fails to demonstrate clear evidence of error in OWCP's May 20, 2016 decision.[28]

To demonstrate clear evidence of error, it is insufficient merely to show that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is

[22] 20 C.F.R. § 10.607(a); *see J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Alberta Dukes*, 56 ECAB 247 (2005).

[23] *Supra* note 10 at Chapter 1.1602.4.

[24] 20 C.F.R. § 10.607(b).

[25] The Board finds as OWCP reviewed the merits of the claim, the August 10, 2017 decision constitutes a merit decision. *See B.S*, Docket No. 13-2010 (issued September 26, 2014) (The determination of whether the evidence submitted by appellant suffices to establish an element of his claim, rather than whether the standard for reconsideration has been met, constitutes a merit review.)

[26] *R.K.*, Docket No. 19-1474 (issued March 3, 2020); *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

[27] *Id.*

[28] *R.M.*, Docket No. 18-1393 (issued February 12, 2019); *J.R.*, Docket No. 07-1112 (issued November 27, 2007).

intended to represent a difficult standard.[29] None of the evidence submitted manifests on its face that OWCP committed an error in denying appellant's emotional condition claim. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, the evidence is insufficient to demonstrate clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the August 29, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 24, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

[29] *Supra* note 10 at Chapter 2.1602.5.a (February 2016). *See also id.; Dean D. Beets*, 43 ECAB 1153 (1992).